IN THE SUPREME COURT OF FLORIDA

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

Altman Contractors, Inc.,

Appellant,

v.

Crum & Forster Specialty Insurance Company,

Appellee.

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

Brief of *Amici Curiae* American Insurance Association, Florida Insurance Council, and Property Casualty Insurers Association of America in Support of Appellee

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Statement of Interest of *Amici Curiae*

The American Insurance Association ("AIA"), the Florida Insurance Council ("FIC"), and the Property Casualty Insurers Association of America ("PCI") (collectively, "*Amici*") believe that, by virtue of their experience and broad membership, they have perspectives and information, which will serve as a useful supplement to the issues presented to the Court.

AIA is a leading national trade association representing approximately 325 major property and casualty insurance companies that collectively underwrite more than $127 billion in property and casualty insurance nationwide, including nearly $5 billion in commercial lines of insurance in Florida. AIA members, ranging in size from small companies to the largest insurers with global operations, underwrite virtually all lines of property and casualty insurance, including policies issued to contractors and subcontractors doing business in Florida.

FIC is the result of the 1962 merger of three separate state insurance trade organizations. It is Florida's largest company trade association, representing 31 insurer groups – consisting of 236 companies – which write over $33 billion a year in premiums and provide all lines of coverage.

PCI is a national property casualty trade association that promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of nearly 1,000 member companies,

representing the broadest cross section of insurers of any national trade association. PCI members write $202 billion in annual premium, 35% of the nation's property casualty insurance. In Florida, PCI members write 40.5% of the property casualty market, including 41.4% of the personal lines market and 39.5% of the commercial lines market. In addition to providing extensive services on behalf of its members before federal and state legislators and regulators, PCI undertakes to address issues of importance to its members and the broader insurer community by providing amicus support where appropriate before federal and state appellate courts.

Crum's relevant policy language comes from standard commercial general liability (CGL) forms drafted by the Insurance Services Office (ISO), "an industry organization that promulgates various standard insurance policies that are utilized by insurers throughout the country." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 880 (Fla. 2007). *Amici*'s interest is in upholding the plain language of the insurance contracts.

Summary of the Argument

A CGL policy carries two distinct obligations: the duty to indemnify the insured against covered damages; and the duty to defend the insured against "suits" seeking covered damages. This case involves the defense obligation. Altman and its *amici* make sweeping public policy arguments about the duty to defend, but they gloss over the most basic questions of Florida insurance law. What does the

policy say, and how has this Court interpreted that language? Staying focused on these questions, Altman's proposed rule proves unworkable.

A suit must "seek" covered damages to trigger a duty to defend. Time and again, this Court has looked to the four-corners of the underlying tort complaint to answer this question. A complaint must demand damages and plead facts supporting an entitlement to relief, but a Chapter 558 notice need not. The notice in this very case omitted any demand for damages. Altman's argument does not square with settled Florida duty-to-defend law.

Nor does Altman's argument square with the Crum policies' definition of "suit." A centerpiece of Altman's argument is that Chapter 558 creates a mandatory ADR proceeding other than arbitration. If so, the process cannot be a "suit." That defined term includes any *arbitration* "to which the insured must submit or does submit with [the insurer's] consent." There is no "must submit" language for any other ADR proceeding, which can be a "suit" only if the insurer consents to the proceeding. A mandatory ADR proceeding, other than arbitration, cannot be a "suit."

Altman's real argument is that Chapter 558 requires rewriting the insurance contracts as a public policy matter. The statute's plan text, however, shows the Legislature did not intend to rewrite insurance policies or Florida duty-to-defend

law. Chapter 558 expressly requires an insurer to take no action when the recipient refers the claimant to its insurer for resolution.

Altman's and its *amici*'s public policy arguments depend on an inaccurate caricature of insurer-insured relations. If a Chapter 558 notice seems likely to lead to a suit seeking covered damages, an insurer has equal or greater incentive than its insured does to settle a claim at the Chapter 558 stage. The insurer, not the insured, will be the one to pay to defend a suit seeking covered damages. There is no reason or justification for rewriting the insurance contract between Crum and Altman. The policy language and Florida law compel a ruling for Crum.

Argument

I. The Policies' Plain Language Requires a Ruling for Crum.

A. Altman's argument cannot square with Florida's four-corners analysis for determining if a suit is "seeking" covered damages.

Crum has "the right and duty to defend the insured against any 'suit' seeking [covered] damages" because of "property damage," but Crum has "no duty to defend the insured against any 'suit' seeking damages for … 'property damage' to which this insurance does not apply." DE 16-12 at 8.

For six decades, this Court has looked to the underlying complaint to decide if a suit is "seeking" covered damages. *Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So. 2d 435, 443 (Fla. 2005); *Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc.*, 358 So. 2d 533, 536 (Fla. 1977); *New Amsterdam Cas. Co. v. Knowles*, 95 So. 2d 413,

415 (Fla. 1957). "When the actual facts are inconsistent with the allegations in the complaint, the allegations in the complaint control in determining the insurer's duty to defend." *Jones*, 908 So. 2d at 443. This is known as the "four corners" rule. *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 8 (Fla. 2004).

The four-corners rule reflects key features of a complaint that enable a court to determine whether a plaintiff is "seeking" covered damages. A plaintiff must plead facts "showing that the pleader is entitled to relief" against the defendant. Fla. R. Civ. P. 1.110(b); Fed. R. Civ. P. 8(a). An attorney or party who knowingly pleads false facts risks sanctions. *See* Fla. Stat. § 57.105; Fed. R. Civ. P. 11.

A Chapter 558 claimant, however, need not assert that the recipient is liable for damages or plead facts in good faith supporting an entitlement to relief. The Chapter 558 notice must only "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." Fla. Stat. § 558.004(1). There is no requirement that a claimant believe or assert that the recipient is responsible. *Cf.* Fla. Stat. § 558.004(3) (imposing such a requirement only for recipient to forward to another professional). The Chapter 558 process is not an alternative form of "litigation." The point of the process is to resolve disputes without any kind of litigation (be it traditional court suits, arbitrations, or any other process involving a decision-maker). As such, its requirements for a notice of

claim are not as demanding as that required in a suit. Only if the process fails, and the claimant later files suit, must it articulate a factual and legal theory of liability.

The Chapter 558 notice in this particular case illustrates the problems of treating statutory notices as the equivalent of complaints. The association's notice demanded only that Altman take remedial action – "all measures necessary to correct the identified construction and/or design defects." DE 5-3 at 3. It made no demand for damages, because Chapter 558 did not require the association to do so. Chapter 558's requirements are not akin to the rules of civil pleading.

In short, a Chapter 558 notice does not fit with Florida's four-corners analysis. Florida's duty-to-defend analysis has always been clear-cut. An insurer must review the complaint, which is a particular document serving a particular purpose that is subject to rules of pleading designed to promote that purpose. A Chapter 558 notice is subject to different requirements that reflect its different purposes. In saying that a Chapter 558 proceeding triggers a duty to defend, Altman misunderstands what it means to "seek damages" under Crum's standard insuring agreement and Florida duty-to-defend law.

B. The Chapter 558 process falls outside the definition of "suit."

In arguing that the Chapter 558 process is a civil proceeding, Altman characterizes the process as "mandatory" 19 times. Crum responds that participation is mandatory only for the claimant, not a recipient; the only

consequence of a recipient's silence is that the claimant can proceed to file suit. Altman's "mandatory" argument, even if correct, would create a different obstacle for Altman under the "suit" definition.

The definition of "suit" provides:

> "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*.

DE 16-2 at 22 (emphasis added). No one contends the Chapter 558 process is an arbitration. Rather, Altman seeks to shoehorn Chapter 558 into section **b**.

Section **a**'s "must submit" is missing from section **b**, which is narrower.[1] For an ADR proceeding, other than arbitration, to qualify as a "suit," the insurer must consent to the proceeding. The table below illustrates this distinction:

	Insurer consents to ADR proceeding claiming covered damages	**Mandatory ADR proceeding seeks covered damages**
Arbitration	"Suit"	"Suit"
ADR other than arbitration	"Suit"	Not a "suit"

[1] Sections **a** and **b** both require a "civil proceeding" in which covered damages are "alleged" and "claimed." The district court correctly held that the Chapter 558 process cannot be such a "civil proceeding," because it cannot result in an award of damages against the insured. DE 66 at 8–16; *Cincinnati Ins. Co. v. Amsco Windows*, 593 F. App'x 802, 810 (10th Cir. 2014); *supra* § I.A.

If the Chapter 558 process is, as Altman contends, a mandatory ADR proceeding other than arbitration, the process would fall unambiguously outside the definition of "suit."

To treat the Chapter 558 process as a "suit" under prong **b** would violate Florida law by rendering the "must submit" language of prong **a** meaningless. *See Morales v. Zenith Ins. Co.*, 152 So. 3d 557, 561 (Fla. 2014) (Florida courts read an insurance "policy as a whole, endeavoring to give every provision its full meaning and operative effect") (quoting *J.S.U.B.*, 979 So. 2d at 877). Prong **b** applies only to voluntary ADR processes, other than arbitration, to which the insurer consents – such as a "binding mediation," where the mediator makes an award in the event of an impasse. *Bowers v. Raymond J. Lucia Cos.*, 142 Cal. Rptr. 3d 64, 71 (Ct. App. 2012). Altman would rewrite prong **b** to add prong **a**'s "must submit" language. Altman cannot satisfy the unambiguous "suit" definition or, therefore, Florida law.

C. The policies distinguish between claims and "suits."

There is a difference between a claim and a "suit" under the policies. The insurer has "the *right and duty* to defend the insured against any 'suit' seeking [covered] damages …. We *may*, *at our discretion*, investigate any 'occurrence' and settle any claim or "suit" that may result." DE 16-2 at 8 (emphasis added). The duty to defend attaches only to a "suit," but the insurer has a discretionary right to investigate a claim or to settle a claim or suit. *Id.*

Consistent with this distinction, the policy refers separately to claims and to "suits." If a Chapter 558 notice alleges covered "property damage," the insured must forward the notice to the insurer, because the policyholder has the duty to notify the insurer "as soon as practicable, of "occurrences" or claims, not just "suits." DE 16-2 at 17. From there, the insured must "[c]ooperate … in the *investigation or settlement of [a] claim* or defense against [a] 'suit.'" *Id.* (emphasis added). For "any claim we investigate or settle, or any 'suit' against an insured we defend," the insurer will pay, outside of policy limits, all "expenses we incur" and all "reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or 'suit.'" DE 16-2 at 14–15. These separate references to claims and "suits" reinforce that an insurer has discretion whether to involve itself in the investigation of a pre-suit claim. In the next section, *Amici* discuss how Chapter 558 respects that distinction.

II. The Legislature Chose Language to Avoid Creating a Duty to Defend.

Although a claimant must serve a Chapter 558 before filing suit, not every Chapter 558 notice leads to a suit. Indeed, the goal of the process is to avoid any kind of litigation entirely via voluntary repairs by the involved contractor. "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 Constr., Inc., 3 So. 3d 417, 419. (Fla. 4th DCA 2009). Under the language of the statute, Chapter 558 is not a mandatory trigger for defense.

A. Section 558.004(13) presumes that a recipient makes no insurance claim by forwarding the notice to its insurer.

During the Crum policy periods, Chapter 558 provided that, although the statute did not "impair technical notice provisions," the "providing of a copy of [a Chapter 558] notice to the person's insurer … shall not constitute a claim for insurance purposes." Fla. Stat. § 558.004(13) (eff. July 1, 2004). Effective October 1, 2015, the statute states that "providing of a copy of such notice to the person's insurer … shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise." Fla. Stat. § 558.004(13) (eff. Oct. 1, 2015). The presumption remains that a Chapter 558 notice imposes no obligations on insurers.

The language of Chapter 558 stands in stark contrast with the Colorado statute to which Altman analogizes.[2] Before 2010, the Colorado Construction Defect Reform Act said nothing about insurance. *See Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Colo. Ct. App. 2012); Colo. Rev. Stat. §§ 13-20-801–13-20-807. Under a 2010 amendment, an "insurer's duty to defend … shall be triggered

[2] Altman's citation to *Clarendon Am. Ins. Co. v. StarNet Ins. Co.*, 113 Cal. Rptr. 3d 585 (Ct. App. 2010), *rev. granted*, 242 P.3d 67 (Cal. 2010), *rev. dismissed*, 248 P.3d 191 (Cal. 2011), warrants no substantive response. Because the California Supreme Court granted and then dismissed review, the decision is not precedential and cannot be cited. *See* Cal. R. Ct. 8.1105(e), 8.1115(a).

by a potentially covered liability described in … [a] notice of claim." Colo. Rev. Stat. § 13-20-808(7)(a).

The contrast between the Florida and Colorado statutes highlights that the Florida Legislature drafted Chapter 558 to avoid mandating a defense. Altman has no basis to suggest that subsection § 558.004(13) somehow mandates treating a Chapter 558 notice as a "suit" triggering a defense obligation under a CGL policy.

B. Section 558.004(5)(e) requires no response from the insurer if the insured asks the insurer to settle the claim.

There are five ways an insured can respond to a Chapter 558 notice, under the pre-2015 and current versions of the statute. The insured can deny liability, immediately ending the process. Fla. Stat. § 558.004(5)(d). The insured can offer to remedy the defect, resolving the claim without any payment of sums that might fall within the liability insuring agreement. Fla. Stat. § 558.004(5)(a); DE 16-12 at 8. Or the insured can make a monetary offer, alone or in conjunction with an offer to make repairs. Fla. Stat. § 558.004(5)(b)–(c). Such an offer "will not obligate the person's insurer." *Id.* The statute thus makes clear that it does not override the standard policy provision that the insured will not make any voluntary payments, except at its own expense. *Am. Reliance Ins. Co. v. Perez*, 712 So. 2d 1211, 1212–13 (Fla. 3d DCA 1998); DE 16-12 at 8. Alternatively, the insured can ask its insurer to settle the claim pursuant to this authority:

> A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of serving the claim, which service shall occur at the same time the claimant is notified of this settlement option, which the claimant may accept or reject. A written statement under this paragraph may also include an offer [of the insured's own money] but such offer shall be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment in addition thereto. If the insurer for the person served with the claim makes no response within the 30 days following service, then the claimant shall be deemed to have met all conditions precedent to commencing an action.

Fla. Stat. § 558.004(5)(e).

The insurer has the statutory right to accept, decline, or ignore the insured's invitation. If the insurer chooses not to engage, the only consequence is that the claimant can proceed to file suit. As discussed in the next section, the suit leaves the insured in no worse a position, and the insurer in no better a position. To force Crum to defend at the Chapter 558 stage would violate the insurance contract and § 558.004(5)(e).

C. It makes sense for the Legislature to draft Chapter 558 to avoid mandating a defense obligation.

Altman and its *amici* offer a solution in search of a problem. At a fundamental level, they misunderstand the economic incentives and disincentives that insurers and insureds have at the Chapter 558 stage. The Legislature, being in the best position to make public policy judgments, had good reason to choose language that avoided triggering a duty to defend.

1. Insurers have strong incentive to engage at the Chapter 558 stage.

Altman and its *amici* are wrong to assume that the only way insurers will participate in the Chapter 558 process is by imposing a duty to defend. Liability insurers have an economic interest in seeking early settlement in appropriate cases. For example, an insurer can settle a "claim based on its own self-interest, and this authority includes settling for the nuisance value of the claim," even if the insured objects. *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 591 So. 2d 174, 177 (Fla. 1992); *see Rogers v. Chicago Ins. Co.*, 964 So. 2d 280, 282 (Fla. 4th DCA 2007) (rejecting insured's objection that settlement led to higher premiums). If a Chapter 558 notice presents an opportunity to settle a potentially covered loss without litigation, a CGL insurer – who faces the prospect of paying defense costs outside policy limits if litigation ensues (DE 16-2 at 14–15) – has just as much incentive to participate in the process as would a self-insured contractor with its own money at stake.

2. Insureds may not want the notice to trigger a defense obligation.

It is not necessarily in an insured's interest for a claim to appear on its loss run. *See Consedine v. Pers. Mgmt., Inc.*, 539 F. App'x 565, 569 (5th Cir. 2013) (explaining concept of a loss run); *cf. Rosen v. Am. Guarantee & Liab. Ins. Co.*, 503 F. App'x 768, 771 nn.1, 4 (11th Cir. 2013) (policyholder, as part of settlement with insurer, demanded that certain claims not appear on its loss run). Just as § 558.004(5)(e) gives insurers a choice whether to accept their insureds' invitations

to participate in settlement discussions, it also gives insureds a choice whether to extend that invitation. *Supra* § II.A.

For example, initially defective work is not "property damage" under a CGL policy. Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241, 1248 (Fla. 2008). Only consequential damages are. *Id.* If consequential damages are a minor part of the claim, the policyholder may well want a chance to settle a claim without its insurer paying defense costs that would appear on its loss run. The statute recognizes the insured's ability to settle the claim at its own expense, without obligating its insurer. *Supra* § II.B.

The greatest impact of a ruling for Altman, a general contractor, could fall on subcontractors. It is typical for a general contractor to require that its subcontractors name it as an "additional insured" on their insurance policies. Trisha Strode, Note, *From the Bottom of the Food Chain Looking Up: Subcontractors Are Finding that Additional Insured Endorsements Are Giving Them Much More than They Bargained For*, 23 ST. LOUIS U. PUB. L. REV. 697, 698 (2004). "Every time his insurance becomes involved to defend or pay a judgment, the subcontractor must pay his deductible and further faces the possibility of escalating premiums and diluting policy limits to pay his own costs and judgments." *Id.* The general contractor is insulated from those consequences. Samir B. Mehta, Comment, *Additional Insured Status in Construction Contracts*

and Moral Hazard, 3 CONN. INS. L.J. 169, 186–87 (1996). Compounding the expense, an insurer may need to appoint separate counsel for the general contractor and the subcontractor. *Univ. of Miami v. Great Am. Assur. Co.*, 112 So. 3d 504, 508 (Fla. 3d DCA 2013). While *Amici*'s member companies issue policies to both general contractors and subcontractors, it is important to recognize that not all insureds have the same interest in whether a Chapter 558 notice is a "suit."

3. Insureds face no significant burdens in responding to Chapter 558 notices on their own.

A ruling for Crum will not harm insureds. If an insurer chooses not to participate in the Chapter 558 process, the insured faces little burden in responding. Discovery is limited to requests for preexisting documents, and the claimant must offer to pay for the cost of reproduction. *See* Fla. Stat. § 558.004(15). The insured can simply disclaim responsibility or refer the claimant to its insurer for a settlement decision. Fla. Stat. § 558.004(5)(d)–(e). No attorney is needed for these easy courses, which end the Chapter 558 process. If a lawsuit follows and seeks covered damages, the insured, being entitled to a defense, faces no economic injury from its insurer's decision not to participate in the process.

Consider, for instance, a hypothetical case where a claimant sends Chapter 558 notices regarding a roofing defect to every company working on a project, including ABC Corporation – whose vague name does not make clear that it is a landscaping subcontractor. After all, a claimant can send notices to every

contractor, subcontractor, supplier, or design professional, without knowing or alleging a basis for liability. *Supra* § I.A. If ABC wants to protect its right to seek a defense in the event of a lawsuit that frivolously joins it as a defendant, ABC must forward the notice to the insurer. If the Chapter 558 notice is not a "suit," as the district court held, ABC can easily respond by disclaiming liability, producing a copy of its file, and enclosing an invoice for the reasonable cost of copying its file. *See* Fla. Stat. § 558.004(5), (15). It need not retain an attorney. Under Altman's proposed rule, however, ABC's insurer would need to retain and pay attorneys to orient themselves to the case and draft the response with the care required to meet their duty of competence. *See* Fla. Bar Rule 4-1.1.

Not every Chapter 558 notice will look like the lawyer-drafted notice Altman received here. As Crum persuasively argues, Chapter 558 is drafted to help avoid parties prematurely "lawyering up." If, for example, a homeowner's association chooses to draft a Chapter 558 notice without a lawyer, and if the insurer must appoint counsel to represent the insured at that stage, the association's likely response will be to retain a lawyer. Once the claimant retains counsel, its legal fees (whether on an hourly or contingency basis) make it harder for the claimant to be made whole and, therefore, for the case to settle. Treating a Chapter 558 notice as a "suit" is incompatible with Florida's approach to the duty to defend and with the public policies that Chapter 558 seeks to promote.

D. The CERCLA analogy, advanced by Altman's *amici*, is inapt.

The brief of Leading Builders of America et al. ("LBA") draws an inapt analogy between this case and cases addressing whether a Potentially Responsible Party (PRP) notice under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is a "suit" under a CGL policy. Courts have divided on that question.[3] CERCLA coverage decisions, however, serve only to highlight that the Chapter 558 process lacks the attributes that have led certain courts to treat PRP letters as suits.

LBA relies on *McGinnes Indus. Maint. Corp. v. Phoenix Ins. Co.*, 477 S.W.3d 786 (Tex. 2015), which characterized the CERCLA process as follows:

> [1] 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.
>
> [2] 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 [of up to $25,000 per day]. 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.
>
> [3] The EPA need turn to the courts only for enforcement of its decisions. A PRP cannot seek judicial review until the process is

[3] *Compare, e.g, Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 280 (Cal. 1998) ("There is nothing in the policy language to support the interpretation that some pre-complaint notices are 'suits' and some are not. Rather, the unambiguous language of the policies obligated the insurers to defend a 'suit' not … the 'substantive equivalent' of a 'suit.'"), *with Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433, 449 (Neb. 2010) ("A PRP letter is the functional equivalent of a 'suit' … [because it] carrie[s] with it the EPA's coercive powers.").

> 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.

Id. at 788–89 (numbering added)[4]; *see* 42 U.S.C. §§ 9604(e), 9606, 9607.

The similarities between CERCLA and Chapter 558 begin and end at the first step. "The one remedy specified for noncompliance with [Chapter 558] is abatement, upon a timely motion, until the offending party complies with the statutory procedures." *Hebden*, 3 So. 3d at 419. "The statute does not forfeit substantive rights as a penalty for noncompliance; it is expressly limited in scope." *Id.* Without substantive penalties for failing to negotiate, Chapter 558 falls outside the *McGinnes* rationale.

A Chapter 558 claimant, unlike the EPA, cannot compel any investigation or creation of new data or documents. It can request only existing project documents, and it must bear the cost of reproduction. Fla. Stat. § 558.004(15). Although the claimant may, in a later lawsuit, seek "such sanctions as the court may impose for a discovery violation," *id.*, such sanctions apparently should not "forfeit substantive rights." *Hebden*, 3 So. 3d at 419.

[4] The Texas case drew a four-justice dissent. *McGinnes*, 477 S.W.3d at 796–805 (Boyd, J., dissenting). *Amici* quote from the majority opinion to show that LBA's analogy is inapt, not to endorse its reasoning.

Finally, the non-binding Chapter 558 process cannot even arguably impose liability against the insured, actually or constructively. *Hebden*, 3 So. 3d at 419. The CGL insuring agreement applies only to sums that the insured "becomes *legally obligated* to pay as damages." DE 16-2 at 8 (emphasis added). LBA's CERCLA analogy highlights why the Chapter 558 process is not a "suit."

Conclusion

For these reasons, and the reasons stated by Crum and the district court, this Court should rule for Crum.

Respectfully submitted:

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Addendum

Fla. Stat. § 558.001

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 with an opportunity to resolve the claim without resort to further legal process.

Fla. Stat. § 558.002

[Brackets and italics denote revisions effective October 1, 2015]

As used in this chapter, the term:

(1) "Action" means any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of real or personal property caused by an alleged construction defect, but does not include any administrative action or any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect.

(2) "Association" has the same meaning as in s. 718.103(2), s. 719.103(2), s. 720.301(9), or s. 723.075.

(3) "Claimant" means a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional.

(4) "Completion of a building or improvement" means 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.

[(4)"Completion of a building or improvement" means issuance of a certificate of occupancy, whether temporary or otherwise, that allows for occupancy or use of the entire building or improvement, or an equivalent authorization issued by the

governmental body having jurisdiction. In jurisdictions where no certificate of occupancy or equivalent authorization is issued, the term means substantial completion of construction, finishing, and equipping of the building or improvement according to the plans and specifications.]

(5) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:

(a) Defective material, products, or components used in the construction or remodeling;

(b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84;

(c) A failure of the design of real property to meet the applicable professional standards of care at the time of governmental approval; or

(d) A failure to construct or remodel real property in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

(6) "Contractor" means any person, as defined in s. 1.01, that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing, or remodeling real property.

(7) "Design professional" means a person, as defined in s. 1.01, licensed in this state as an architect, interior designer, landscape architect, engineer, surveyor, or geologist.

(8) "Real property" or "property" means land that is improved and the improvements on such land, including fixtures, manufactured housing, or mobile homes and excluding public transportation projects.

(9) "Service" means delivery by certified mail with a United States Postal Service record of evidence of delivery or attempted delivery to the last known address of the addressee, by hand delivery, or by delivery by any courier with written evidence of delivery.

(10) "Subcontractor" means a person, as defined in s. 1.01, who is a contractor who performs labor and supplies material on behalf of another contractor in the construction or remodeling of real property.

(11) "Supplier" means a person, as defined in s. 1.01, who provides only materials, equipment, or other supplies for the construction or remodeling of real property.

Fla. Stat. § 558.003

A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter, on timely motion by a party to the action the court shall stay the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements. The notice requirement is not intended to interfere with an owner's ability to complete a project that has not been substantially completed. The notice is not required for a project that has not reached the stage of completion of the building or improvement.

Fla. Stat. § 558.004

[Brackets and italics denote revisions effective October 1, 2015]

(1) In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted. 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 claimant shall endeavor to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to serve notice of claim within 15 days does not bar the filing of an action, subject to s. 558.003. This subsection does not preclude a claimant from filing an action sooner than 60 days, or 120 days as applicable, after service of written notice as expressly provided in subsection (6), subsection (7), or subsection (8).

[(1) (a) In actions brought alleging a construction defect, the claimant shall, at least 60 days before filing any action, or at least 120 days before filing an action involving an association representing more than 20 parcels, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted.

(b) The notice of claim must describe in reasonable detail the nature of each alleged construction defect and, if known, the damage or loss resulting from the defect. Based upon at least a visual inspection by the claimant or its agents, the

notice of claim must identify the location of each alleged construction defect sufficiently to enable the responding parties to locate the alleged defect without undue burden. The claimant has no obligation to perform destructive or other testing for purposes of this notice.

(c) The claimant shall endeavor to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to serve notice of claim within 15 days does not bar the filing of an action, subject to s. 558.003. This subsection does not preclude a claimant from filing an action sooner than 60 days, or 120 days as applicable, after service of written notice as expressly provided in subsection (6), subsection (7), or subsection (8).]

(2) Within 30 days after service of the notice of claim, or within 50 days after service of the notice of claim involving an association representing more than 20 parcels, the person served with the notice of claim under subsection (1) is entitled to perform a reasonable inspection of the property or of each unit subject to the claim to assess each alleged construction defect. An association's right to access property for either maintenance or repair includes the authority to grant access for the inspection. The claimant shall provide the person served with notice under subsection (1) and such person's contractors or agents reasonable access to the property during normal working hours to inspect the property to determine the nature and cause of each alleged construction defect and the nature and extent of any repairs or replacements necessary to remedy each defect. The person served with notice under subsection (1) shall reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections. The inspection may include destructive testing by mutual agreement under the following reasonable terms and conditions:

(a) If the person served with notice under subsection (1) determines that destructive testing is necessary to determine the nature and cause of the alleged defects, such person shall notify the claimant in writing.

(b) The notice shall describe the destructive testing to be performed, the person selected to do the testing, the estimated anticipated damage and repairs to or restoration of the property resulting from the testing, the estimated amount of time necessary for the testing and to complete the repairs or restoration, and the financial responsibility offered for covering the costs of repairs or restoration.

(c) If the claimant promptly objects to the person selected to perform the destructive testing, the person served with notice under subsection (1) shall provide the claimant with a list of three qualified persons from which the claimant may select one such person to perform the testing. The person selected

to perform the testing shall operate as an agent or subcontractor of the person served with notice under subsection (1) and shall communicate with, submit any reports to, and be solely responsible to the person served with notice.

(d) The testing shall be done at a mutually agreeable time.

(e) The claimant or a representative of the claimant may be present to observe the destructive testing.

(f) The destructive testing shall not render the property uninhabitable.

(g) There shall be no construction lien rights under part I of chapter 713 for the destructive testing caused by a person served with notice under subsection (1) or for restoring the area destructively tested to the condition existing prior to testing, except to the extent the owner contracts for the destructive testing or restoration.

If the claimant refuses to agree and thereafter permit reasonable destructive testing, the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented.

(3) Within 10 days after service of the notice of claim, or within 30 days after service of the notice of claim involving an association representing more than 20 parcels, the person served with notice under subsection (1) may serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible. The notice described in this subsection may not be construed as an admission of any kind. Each such contractor, subcontractor, supplier, and design professional may inspect the property as provided in subsection (2).

(4) Within 15 days after service of a copy of the notice of claim pursuant to subsection (3), or within 30 days after service of the copy of the notice of claim involving an association representing more than 20 parcels, the contractor, subcontractor, supplier, or design professional must serve a written response to the person who served a copy of the notice of claim. The written response shall include a report, if any, of the scope of any inspection of the property, the findings and results of the inspection, a statement of whether the contractor, subcontractor, supplier, or design professional is willing to make repairs to the property or whether such claim is disputed, a description of any repairs they are willing to make to remedy the alleged construction defect, and a timetable for the completion

of such repairs. This response may also be served on the initial claimant by the contractor.

[(4) Within 15 days after service of a copy of the notice of claim pursuant to subsection (3), or within 30 days after service of the copy of the notice of claim involving an association representing more than 20 parcels, the contractor, subcontractor, supplier, or design professional must serve a written response to the person who served a copy of the notice of claim. The written response must include a report, if any, of the scope of any inspection of the property and the findings and results of the inspection. The written response must include one or more of the offers or statements specified in paragraphs (5)(a)-(e), as chosen by the responding contractor, subcontractor, supplier, or design professional, with all of the information required for that offer or statement.]

(5) Within 45 days after service of the notice of claim, or within 75 days after service of a copy of the notice of claim involving an association representing more than 20 parcels, the person who was served the notice under subsection (1) must serve a written response to the claimant. The response shall be served to the attention of the person who signed the notice of claim, unless otherwise designated in the notice of claim. The written response must provide:

(a) A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;

(b) A written offer to compromise and settle the claim by monetary payment, that will not obligate the person's insurer, and a timetable for making payment;

(c) A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person's insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment;

(d) A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or

(e) A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of serving the claim, which service shall occur at the same time the claimant is notified of this settlement option, which the claimant may accept or reject. A written statement under this paragraph may also include an offer under paragraph (c), but such offer shall be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment in addition thereto. If the insurer for the person

served with the claim makes no response within the 30 days following service, then the claimant shall be deemed to have met all conditions precedent to commencing an action.

(6) If the person served with a notice of claim pursuant to subsection (1) disputes the claim and will neither remedy the defect nor compromise and settle the claim, or does not respond to the claimant's notice of claim within the time provided in subsection (5), the claimant may, without further notice, proceed with an action against that person for the claim described in the notice of claim. Nothing in this chapter shall be construed to preclude a partial settlement or compromise of the claim as agreed to by the parties and, in that event, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim.

(7) A claimant who receives a timely settlement offer must accept or reject the offer by serving written notice of such acceptance or rejection on the person making the offer within 45 days after receiving the settlement offer. If a claimant initiates an action without first accepting or rejecting the offer, the court shall stay the action upon timely motion until the claimant complies with this subsection.

(8) If the claimant timely and properly accepts the offer to repair an alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the claimant's property during normal working hours to perform the repair by the agreed-upon timetable as stated in the offer. If the offeror does not make the payment or repair the defect within the agreed time and in the agreed manner, except for reasonable delays beyond the control of the offeror, including, but not limited to, weather conditions, delivery of materials, claimant's actions, or issuance of any required permits, the claimant may, without further notice, proceed with an action against the offeror based upon the claim in the notice of claim. If the offeror makes payment or repairs the defect within the agreed time and in the agreed manner, the claimant is barred from proceeding with an action for the claim described in the notice of claim or as otherwise provided in the accepted settlement offer.

(9) This section does not prohibit or limit the claimant from making any necessary emergency repairs to the property as are required to protect the health, safety, and welfare of the claimant. In addition, any offer or failure to offer pursuant to subsection (5) to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect and is not admissible in an action brought under this chapter.

(10) A claimant's service of the written notice of claim under subsection (1) tolls the applicable statute of limitations relating to any person covered by this chapter and any bond surety until the later of:

(a) Ninety days, or 120 days, as applicable, after service of the notice of claim pursuant to subsection (1); or

(b) Thirty days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer. By stipulation of the parties, the period may be extended and the statute of limitations is tolled during the extension.

(11) The procedures in this chapter apply to each alleged construction defect. However, a claimant may include multiple defects in one notice of claim. The initial list of construction defects may be amended by the claimant to identify additional or new construction defects as they become known to the claimant. The court shall allow the action to proceed to trial only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter and as to construction defects reasonably related to, or caused by, the construction defects previously noticed. Nothing in this subsection shall preclude subsequent or further actions.

(12) This chapter does not:

(a) Bar or limit any rights, including the right of specific performance to the extent such right would be available in the absence of this chapter, any causes of action, or any theories on which liability may be based, except as specifically provided in this chapter;

(b) Bar or limit any defense, or create any new defense, except as specifically provided in this chapter; or

(c) Create any new rights, causes of action, or theories on which liability may be based.

(13) This section does not relieve the person who is served a notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section. However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person’s insurer, if applicable, shall not constitute a claim for insurance purposes. Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.

[(13) This section does not relieve the person who is served a notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section. However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes unless the terms of the policy specify otherwise. Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.]

(14) To the extent that an arbitration clause in a contract for the sale, design, construction, or remodeling of real property conflicts with this section, this section shall control.

(15) Upon request, the claimant and any person served with notice pursuant to subsection (1) shall exchange, within 30 days after service of a written request, which request must cite this subsection and include an offer to pay the reasonable costs of reproduction, any 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. In the event of subsequent litigation, any party who failed to provide the requested materials shall be subject to such sanctions as the court may impose for a discovery violation. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.

[(15) Upon request, the claimant and any person served with notice pursuant to subsection (1) shall exchange, within 30 days after service of a written request, which request must cite this subsection and include an offer to pay the reasonable costs of reproduction, any design plans, specifications, and as-built plans; photographs and videos of the alleged construction defect identified in the notice of claim; 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; and 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. A party may assert any claim of privilege recognized under the laws of this state with respect to any of the disclosure obligations specified in this chapter. In the event of subsequent

litigation, any party who failed to provide the requested materials shall be subject to such sanctions as the court may impose for a discovery violation. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.]

42 U.S.C. § 9604(e)

(1) Action authorized

Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) (or any combination thereof) at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). Any duly designated officer, employee, or representative of a State or political subdivision under a contract or cooperative agreement under subsection (d)(1) of this section is also authorized to take such action. The authority of paragraphs (3) and (4) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant. The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response action under this subchapter, or otherwise enforcing the provisions of this subchapter.

(2) Access to information

Any officer, employee, or representative described in paragraph (1) may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:

(A) The identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of at a vessel or facility or transported to a vessel or facility.

(B) The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a vessel or facility.

(C) Information relating to the ability of a person to pay for or to perform a cleanup.

In addition, upon reasonable notice, such person either (i) shall grant any such officer, employee, or representative access at all reasonable times to any vessel, facility, establishment, place, property, or location to inspect and copy all

documents or records relating to such matters or (ii) shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

(3) Entry

Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

(4) Inspection and samples

(A) Authority

Any officer, employee or representative described in paragraph (1) is authorized to inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any suspected hazardous substance or pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

(B) Samples

If the officer, employee, or representative obtains any samples, before leaving the premises he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

(5) Compliance orders

(A) Issuance

If consent is not granted regarding any request made by an officer, employee, or representative under paragraph (2), (3), or (4), the President may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for consultation as is reasonably appropriate under the circumstances.

(B) Compliance

The President may ask the Attorney General to commence a civil action to compel compliance with a request or order referred to in subparagraph (A). Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:

(i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

The court may assess a civil penalty not to exceed $25,000 for each day of noncompliance against any person who unreasonably fails to comply with the provisions of paragraph (2), (3), or (4) or an order issued pursuant to subparagraph (A) of this paragraph.

(6) Other authority

Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner.

(7) Confidentiality of information

(A) Any records, reports, or information obtained from any person under this section (including records, reports, or information obtained by representatives of the President) shall be available to the public, except that upon a showing satisfactory to the President (or the State, as the case may be) by any person that

records, reports, or information, or particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer, employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of Title 18, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter.

(B) Any person not subject to the provisions of section 1905 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(C) In submitting data under this chapter, a person required to provide such data may (i) designate the data which such person believes is entitled to protection under this subsection and (ii) submit such designated data separately from other data submitted under this chapter. A designation under this paragraph shall be made in writing and in such manner as the President may prescribe by regulation.

(D) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this chapter shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(E) No person required to provide information under this chapter may claim that the information is entitled to protection under this paragraph unless such person shows each of the following:

(i) Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee established under title III of the Amendments and Reauthorization Act of 1986 [42 U.S.C.A. § 11001 et seq.], an officer or employee of the United States or a State or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

(ii) The information is not required to be disclosed, or otherwise made available, to the public under any other Federal or State law.

(iii) Disclosure of the information is likely to cause substantial harm to the competitive position of such person.

(iv) The specific chemical identity, if sought to be protected, is not readily discoverable through reverse engineering.

(F) The following information with respect to any hazardous substance at the facility or vessel shall not be entitled to protection under this paragraph:

(i) The trade name, common name, or generic class or category of the hazardous substance.

(ii) The physical properties of the substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at 20 degrees celsius.

(iii) The hazards to health and the environment posed by the substance, including physical hazards (such as explosion) and potential acute and chronic health hazards.

(iv) The potential routes of human exposure to the substance at the facility, establishment, place, or property being investigated, entered, or inspected under this subsection.

(v) The location of disposal of any waste stream.

(vi) Any monitoring data or analysis of monitoring data pertaining to disposal activities.

(vii) Any hydrogeologic or geologic data.

(viii) Any groundwater monitoring data.

42 U.S.C. § 9606

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not

limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2) (A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of Title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j-4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of Title 15.

42 U.S.C. § 9607(a)–(c)

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions

of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed--

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, other than an incineration vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14)(A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any incineration vessel or any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels

subject to the provisions of Title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

Certificate of Service

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

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Certificate of Compliance

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

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